No. ..... , Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

AND COMPLAINT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Nicholas V. Olds
Esther E. Newton
Assistant Attorneys General

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No._____, Original

STATE OF MICHIGAN,

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vs.

STATE OF OHIO,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

TO THE HONORABLE

THE SUPREME COURT OF THE UNITED STATES

The State of Michigan by Frank J. Kelley, its Attorney General, asks leave of the Court to file its complaint against the State of Ohio and submits in support thereof the following:

STATEMENT IN SUPPORT OF MOTION

This is an action by the State of Michigan against the State of Ohio to be instituted in this Court under authority of Article III, Section 2 of the Constitution of the United States.

The purpose of the proposed action is to determine the boundary, to settle and adjudicate an existing boundary dis-

pute, and to confirm the jurisdiction and sovereignty of the State of Michigan over territory described in the complaint.

The State of Michigan claims that the territory in controversy became a part of the State of Michigan by virtue of the act of admission of the State of Michigan into the Union of January 26, 1837, 5 Stat 144, and by virtue of the real intent of the Congress of the United States in establishing the northern boundary of the State of Ohio and the southern boundary of the State of Michigan pursuant to the Enabling Act of Congress of June 15, 1836, 5 Stat 49, and Act of June 23, 1836, 5 Stat 56, 57, to settle and establish the northern boundary line of the State of Ohio.

For many years before and after the admission of Michigan into the Union there existed uncertainty with respect to the true location of the land boundary between Michigan and Ohio. During the years 1914-1917 the States of Michigan and Ohio, through legislative enactments and reciprocal action, determined, located and monumented the land boundary between Michigan and Ohio from the northwest corner of Ohio to its then eastern land terminus at post 71 located a little more than 900 feet west of the shore of Maumee Bay on swampy land, the northernmost cape of Maumee Bay then having been washed away, as is more particularly set forth in the complaint.

Although the states of Michigan and Ohio did establish, locate and monument their land boundary, nevertheless, there has never been a binding official determination made of the true location of the most northerly cape of the Maumee (Miami Bay) referred to and specified in the Enabling Act of June 15, 1836 and the aforesaid Act of June 23, 1836; and also there has never been any official determination made and fixing of the boundary between these states extending from the aforesaid point through

Lake Erie to the international boundary line. Although during the years there have been attempts and efforts made at resolving the location of this line, the states have been unable through any official action to arrive at any binding agreement, understanding or compact with respect thereto, as is more fully set forth in the complaint.

It is a matter of common concern and importance to the states and to the general public using the waters of Lake Erie that this boundary be ascertained, fixed and determined by judicial action of this Court under the powers vested in it in the Constitution of the United States and the applicable laws thereof.

The State of Michigan recently through a joint legislative committee and its attorney general offered to the Governor of Ohio to settle this dispute by mediation and negotiation by means of a joint boundary commission, but said offer on the part of the State of Michigan was rejected by the Governor of Ohio, as is more fully explained in the complaint.

For the foregoing reasons it is respectfully prayed that the Court grant leave to the State of Michigan to file its complaint against the State of Ohio.

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General
Nicholas V. Olds
Esther E. Newton
Assistant Attorneys General
Attorneys for the Plaintiff,
State of Michigan

The Capitol
Lansing, Michigan
~~October 31, 1966~~.
November 21, 1966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No....., Original

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

COMPLAINT

The State of Michigan, by its Attorney General, Frank J. Kelley, brings this suit in equity against the State of Ohio in an original action for the purpose of settling a boundary dispute existing between them.

I

This complaint is filed for the following purposes:

1. To judicially determine the location of the "most northerly cape of the Maumee (Miami) bay" declared and established in the Enabling Act of Congress of June 15, 1836, c 99, 5 Stat 49.

2. To construe the line "from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie"

in accordance with the real intent of the Congress in enacting the Enabling Act of June 15, 1836 to be an extension of "a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay," i.e., a line following the arc of the great circle drawn from the south bend of Lake Michigan to the north cape of the Maumee bay as found and computed by A. Talcott, Capt. Engineers, pursuant to Act of Congress of July 14, 1832, 4 Stat 596, and Act of March 2, 1833, c 54, sec. 5, 4 Stat 628, and reported to the Congress in Executive Document 54, 24 Congress, 1st Session.

3. To declare and confirm the jurisdiction and sovereignty of the State of Michigan in all that part and area of Lake Erie lying northerly of the boundary line described in subparagraph (2) hereof and to declare and confirm the ownership in the State of Michigan of the bottom lands, including all minerals and other natural resources appertaining thereto, of Lake Erie lying northerly of said boundary line.

II

The jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. 1251.

III

The Act providing for the admission of Michigan into the Union made the admission conditional on the acceptance by Michigan of the provisions thereof in regard to the boundaries therein described, including the boundaries between Michigan and Ohio, and the assent of the State of

Michigan thereto was given in accordance with the requirements of said Act of Congress, by resolution of a convention held for that purpose on the 15th day of December, 1836, so that, upon the passage of the Act of January 26, 1837, 5 Stat 144, Michigan became possessed of full statehood and of complete sovereignty over the territory within her boundaries as therein described. The common boundary between Michigan and Ohio is described in the Act of June 15, 1836, 5 Stat 49, which provides:

> "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania."

The northern boundary of Ohio is also described in the Act of June 23, 1836, 5 Stat 56, 57, "an Act to settle and establish the northern boundary line of the State of Ohio," as follows:

> "That the northern boundary of the State of Ohio shall be established by, and extend to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; thence, northeast, to the northern boundary line of the United States; thence, with said line, to the Pennsylvania line."

IV

Because the true location of the land boundary between

Michigan and Ohio was for many years in a state of uncertainty, between the years 1914-1917, the states of Michigan and Ohio, through legislative enactments and reciprocal action of their officials, caused said land boundary to be surveyed and monumented. A report of said joint surveying and monumenting of the land boundary line is contained in the "Biennial Report of the Director 1914-1916 and Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary," 1916 Pub. 22, Michigan Geol. Series 18, Mich. Geol. and Biol. Survey.

This joint survey extended from the northwest corner of Ohio to its then eastern land terminus at post 71, as is shown on page 82 of said report, located approximately 900 feet west of the shore along the bay on swampy land; according to map No. 9 of this document, a projected line extending from post 71 easterly states it is:

> "Toward original position of northernmost cape of Maumee Bay—Original monument and cape washed away."

Although during the years there have been attempts and efforts made at resolving the location of the boundary line between these states across Lake Erie, no binding agreement, understanding or compact has been arrived at by any official action.

V

1. In order to display graphically the boundary line now in dispute from the most northerly cape of Maumee Bay across Lake Erie to the international boundary line, there is attached a reproduction of the General Map which accom-

panied Captain Talcott's report of December 14, 1835, Executive Doc. 54, 24th Congress, 1st Sess., upon which plaintiff has drawn a projected extension of the line which joins the south bend of Lake Michigan with the north cape of the Maumee Bay as computed by A. Talcott.

Also on said map plaintiff has drawn a projected line across Lake Erie connecting the assumed position of north cape of Maumee Bay with a point on the international boundary line that became turning point 160 of said international boundary line. This line was shown on a base map printed by the United States Department of Interior, Geological Survey, compiled in 1910 and 1911, and is shown as having a bearing of approximately N 63° 45′ E. In a letter dated September, 1930 from the United States Department of Interior, Geological Survey, to L. R. Schoenmann, Land Economic Survey, Michigan Department of Conservation, Lansing, Michigan, it is stated:

> "The map of Ohio which accompanies Prof. C. E. Sherman's Final Report of Ohio Cooperative Topographic Surveys 1922 shows the boundary between Ohio and Michigan in Maumee Bay as an extension of the eastern end of the line, as established in 1915, to an assumed position of North Cape: thence through Lake Erie in a direct line to Turning Point 160 of the International Boundary as established by the International Waterways Commission upon the International Boundary between the Dominion of Canada and the United States through the St. Lawrence and Great Lakes. The position of the point is latitude 41° 51′ 48.582″ longitude 83° 04′ 08.931″."

This line was questioned by Professor C. E. Sherman, Inspector, in his final report, dated 1933, of the Ohio Co-

operative Topographic Survey. All of the foregoing is indicative of the uncertainty of the true course of the boundary line across Lake Erie to the international boundary line.

2. Contrary to the real and true intent of Congress in the passage and enactment of the Enabling Act of June 15, 1836 and the said Act of June 23, 1836, based upon the aforesaid report of A. Talcott transmitted by the President to the Congress, the State of Ohio erroneously claims that the projected line to be drawn across Lake Erie from the north cape of Maumee Bay to the international boundary line should be drawn on a bearing of N 45° E, and there is drawn on the map attached to this complaint a projected line as claimed at the present time by the State of Ohio.

The triangular area of Lake Erie encompassed by the projected line drawn across Lake Erie as claimed by Michigan and the projected N 45° E line as presently claimed by Ohio encompasses approximately 200 square miles of Lake Erie waters and bottom lands. This triangular area in dispute contains many valuable natural resources such as fisheries, bottom lands, minerals in the form of gas and oil, all of which are under the direct sovereign and proprietary control of the state legally entitled to them.

The disputed area has been and will continue to be a source of controversy over which state's laws should be applied and on numerous occasions the State of Ohio has unlawfully arrested Michigan fishermen in said disputed area.

3. Plaintiff, on information and belief, states that the State of Ohio has assumed to take over jurisdiction, control and ownership of the area of Lake Erie herein described and by administrative process has subdivided the area for

the purpose of issuing leases for the exploration and discovery of gas and oil, all of which is contrary to the just legal rights of the State of Michigan.

VI

The long standing controversy over the northern boundary of Ohio and the admission of Michigan into the Union culminated in the passage of the said Enabling Act of June 15, 1836 by the 24th Congress, 1st Session. The Committee on the Judiciary of the House reported to the Congress H.R. No. 383, a copy of which is attached. After extensive hearings the Committee filed its report dated March 2, 1836, H. Rep. No. 380, 24th Congress, 1st Session.

During the course of its investigation this Committee had for its use and consideration all pertinent documents transmitted by the President relating to the northern boundary of the State of Ohio and on page 18 of its report stated:

> "That it is expedient to establish the north boundary of Ohio, by a direct line drawn from the southern extreme of Lake Michigan, after intersecting the eastern boundary of Indiana, to the most northerly cape of the Maumee bay; thence, direct to the territorial line in Lake Erie, and by the said territorial line to the Pennsylvania line:
>
> "That the period has arrived, when Congress ought to exert, in part, a contingent power conferred by the ordinance, and to form a State north of this east line, of dimensions, and capacity to accommodate a population as nearly equal to the territory which may hereafter be formed into another State, as circumstances will

permit: the committee have the honor to report a bill enforcing these opinions''

Thus, it is clear that the real and true intent of the Congress, as evidenced by the contents of this voluminous report, was that the northern boundary of Ohio in connection with the question of admission of Michigan into the Union was to be projected across Lake Erie ''direct to the territorial line in Lake Erie'' on the course of ''a direct line drawn from the southern extreme of Lake Michigan • • • to the most northerly cape of the Maumee.''

The State of Michigan claims that if the real and true intent of the Congress were to be given effect in construing the language of the said Act of June 15, 1836 setting forth the conditions under which Michigan was to be admitted into the Union and the Act of June 23, 1836 establishing the northern boundary of the State of Ohio, this line would be a *direct* extension of Talcott's line across Lake Erie instead of a *broken* line as claimed by the State of Ohio.

VII

The State of Michigan has attempted at various times to make a settlement of its boundary dispute with Ohio. On January 10, 1966 Frank J. Kelley, Attorney General of the State of Michigan, transmitted to the Honorable James Rhodes, Governor of the State of Ohio, a letter, copy of which is attached, proposing ''that a joint boundary commission be authorized and empowered to hear all of the facts and make recommendations to the respective States'' as a means of arriving at an amicable solution of the existing dispute. However, this offer on the part of the State of Michigan was rejected by the Governor of the State of Ohio in a letter dated January 14, 1966 addressed to the Honor-

able Frank J. Kelley, Attorney General of the State of Michigan, copy of which is attached.

The Michigan Legislature taking cognizance of this situation adopted House Concurrent Resolution No. 260, copy of which is attached, being adopted by the House on April 6, 1966 and by the Senate on April 7, 1966. Among other things it requested the Attorney General of the State of Michigan to "take such legal action and to file and prosecute such legal proceedings as may be necessary in the Supreme Court of the United States or any other court of competent jurisdiction for the purpose of securing a final and judicial determination of the location of said boundary."

VIII

Wherefore, the State of Michigan prays this Honorable Court to grant the following relief:

1. Declare and determine that the boundary line in Lake Erie between the State of Michigan and the State of Ohio from Post No. 71 consists of a direct line projected across Lake Erie to the international boundary line as being an extension of a direct line drawn from the southern extreme of Lake Michigan to the most northerly cape of Maumee in the manner and form more fully stated in this complaint.

2. Judicially determine the location of the most northerly cape of Maumee (Miami) bay as the same was defined and described in the Enabling Act of Congress of June 15, 1836, said cape being the point of beginning of the boundary line to be projected across Lake Erie to the international boundary as hereinbefore described.

3. Declare and confirm the jurisdiction and sovereignty

of the State of Michigan in all that part and area of Lake Erie lying northerly of the boundary line hereinbefore described and declare and confirm the ownership in the State of Michigan of the bottom lands, including all minerals and other natural resources appertaining thereto, of Lake Erie lying northerly of said boundary line.

4. Since the foregoing requires the ascertainment of facts and involves disputed questions of law, appoint a special master with full power to hear the issues of fact and law and file his recommendations.

5. Grant such other and further relief as this Court may deem proper and necessary.

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Nicholas V. Olds
Esther E. Newton
Assistant Attorneys General

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the ~~31st~~ 21st day of ~~October~~ November, 1966, he served the within and foregoing "Motion for Leave to File Complaint and Complaint" upon the sovereign State of Ohio, the defendant in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Lansing, Ingham County, Michigan, two copies each of the within and foregoing Motion and Complaint, securely enclosed in an envelope, air mail postage duly prepaid, addressed to each of the following officials of said defendant State respectively, at his post office address, as stated below, that is to say:

Honorable James A. Rhodes
Governor of the State of Ohio
Columbus, Ohio

Honorable William B. Saxbe
Attorney General of the State of Ohio
Columbus, Ohio

Robert A. Derengoski

FOLLOWING FOLDOUTS/EXHIBITS ARE TOO LARGE TO FILM

A BILL

To establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union on certain conditions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the northern boundary line of the State of Ohio shall be established by a direct line drawn from the southern extremity of Lake Michigan to the most northerly cape of the Maumee (Miami) bay, after intersecting the eastern boundary line of the State of Indiana; thence northeast to the boundary line between the United States and Canada, in Lake Erie; thence with said line to the Pennsylvania line.

SEC. 2. *And be it further enacted*, That the constitution and State Government, which the people of Michigan have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed: *Provided, however*, That the said State shall consist of, and have jurisdiction over, all the territory included within the following boundaries, and over none other, to wit: beginning at the point where the above named north boundary of Ohio intersects the eastern boundary of Indiana, and running thence with the said boundary line, as above specified, to the territorial line in Lake Erie; thence with the said territorial line through Detroit river, Lake Huron, and Lake Superior, to a point where the said territorial line last touches Lake Superior; thence in a direct line through Lake Superior to the mouth of the Montreal river; thence through the middle of the main channel of Montreal river to the middle of the Lake of the Desert; thence in a direct line to the nearest head water of the Menominee river; thence through the middle of that fork of the said river first touched by said line to the main channel of the said Menominee river, and through the middle of the same to the middle of Green bay; thence through the middle of the main channel of Green bay to the middle of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary line of Indiana, as established by the act of the 19th of April, 1816; thence due east with the said north boundary line to the northwest corner of said State; thence south with the east boundary line of Indiana to the place of beginning.

SEC. 3. *And be it further enacted*, That the State of Michigan shall be admitted into this Union, on an equal footing with the original States, in all respects whatever, upon these fundamental conditions: that the boundary of the said State shall be the lines and limits above established, and that these boundaries shall receive the assent and approbation of the Senators and Representative elected to Congress, and the Legislature of the said State, acting respectively under the authority of the ordinance of the convention which formed the constitution of said State; and as soon as said assent and approval shall have been made, and given, the President of the United States shall be authorized to announce the same, by proclamation; and thereupon, and without any further proceeding on the part of Congress, the admission of the said State into the Union shall be considered as complete, and the Senators and Representative who have been elected by the said State shall be entitled to take their seats in the Senate and House of Representatives, respectively, without further delay.

COPY

STATE OF MICHIGAN

OFFICE OF THE

ATTORNEY GENERAL

LANSING, MICHIGAN

January 10, 1966

The Honorable James Rhodes
Governor of the State of Ohio
The Capitol
Columbus, Ohio

Re: Michigan-Ohio Boundary in Lake Erie

My dear Governor Rhodes:

Although various attempts have been made during the past several decades to determine and settle the boundary between Michigan and Ohio from the land boundary across Lake Erie to the International Boundary Line, so far none of these efforts have proved successful. Consequently, uncertainty still exists as to where the boundary actually is or should be, resulting in confusion regarding the enforcement of our laws, as well as with respect to the ownership of the bottom land of Lake Erie and its minerals.

The Michigan Legislature has formed a special joint Senate-House committee, Representative Raymond C. Kehres of Monroe serving as chairman, for the purpose of investigating this problem and determining what should be done by both the legislative and executive branches of government to achieve an amicable solution with Ohio. I might say, parenthetically, the same situation exists concerning the boundary in Lake Michigan between Michigan and Indiana and also between Michigan and Illinois.

I have discussed this informally with Attorney General William Saxbe, but since this question would affect the State of Ohio at its broadest level, I am addressing this communication to you and invite you to give consideration to the following plan. The joint Senate-House committee and I have in mind a conference to be arranged between representatives of the executive and legislative branches of our two states to be held in Columbus to explore and discuss this situation with the hope and expectation that a joint

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boundary commission be authorized and empowered to hear all of the facts and make recommendations to the respective states. If this course were agreed upon the legislature of our State meeting this year, could pass the legislation necessary to organize our section of the boundary commission. Of course, we would await the meeting of the Ohio Legislature in 1967 to pass similar legislation.

Will you please give this proposal your earnest consideration and advise me as soon as possible as to whether you are in agreement, and if not, what alternative proposal you may want to make.

Respectfully yours,

FRANK J. KELLEY
Attorney General

cc: Rep. Raymond Kehres
Mr. James Hanson - (Sent 1-19-66)

COPY

JAMES A. RHODES
GOVERNOR

STATE OF OHIO
OFFICE OF THE GOVERNOR
COLUMBUS 43215

January 14, 1966

OFFICE OF THE
ATTORNEY GENERAL
RECD JAN 17 1966
Answered

The Honorable Frank J. Kelley
Attorney General
State of Michigan
Lansing, Michigan 48902

Dear Mr. Kelley:

It is fortunate indeed that the question with respect to the Ohio-Michigan boundary does not urgently demand solution as the legislative bodies of our two states are not synchronized. Apparently the Michigan Legislature is in session or has recently been in session. The Ohio General Assembly adjourned sine die some months ago and will not again be in session until January 1967. When it convenes its 107th session, it is likely to be a much different body from the present one as its members will be elected under a new "one man-one vote" apportionment.

It would seem to me that prompt action could be taken to define the boundary wherever it might be in question if Michigan would simply petition the United States Supreme Court for a declaratory judgment on the matter. I understand that the Supreme Court has original jurisdiction in any disputes between states and if it took jurisdiction of the case would be able to name a Special Master to hear evidence.

Sincerely,

JAMES A. RHODES
Governor

JAR:mh

cc: The Honorable William B. Saxbe
Attorney General of Ohio

RECEIVED
FEB 15 1966
LEGAL DIVISION
DEPT. OF CONSERVATION

STATE OF MICHIGAN

MICHIGAN LEGISLATURE

House Concurrent Resolution No. 280

Offered by Representatives Kildee, Deakin and Farnsworth

A CONCURRENT RESOLUTION REQUESTING THE ATTORNEY GENERAL TO FILE AND PROSECUTE PROCEEDINGS IN THE UNITED STATES SUPREME COURT FOR THE DETERMINATION OF THE BOUNDARY BETWEEN THE STATE OF MICHIGAN AND STATE OF OHIO ACROSS LAKE ERIE FROM PORT NO. 71 OF THE ESTABLISHED AND DETERMINED LAND BOUNDARY BETWEEN MICHIGAN AND OHIO TO THE INTERNATIONAL BOUNDARY LINE.

WHEREAS, The Legislatures of the State of Michigan has been concerned with the problem of determining and establishing the boundary line between the State of Michigan and the State of Ohio across Lake Erie particularly from post No. 71 of the land boundary to the International Boundary Line; and

WHEREAS, A Joint Committee of the House of Representatives and Senate under the chairmanship of Representative Raymond C. Kildee has made an investigation of this problem jointly with Attorney General Frank J. Kelley; and

WHEREAS, From said investigation it appears that the boundary between the State of Michigan and the State of Ohio across Lake Erie particularly from post No. 71 of the land boundary line to the International Boundary Line has never been officially legally determined and established; and

WHEREAS, Efforts on the part of the Joint Legislative Committee and the Attorney General of the State of Michigan to have said boundary determined and established by a Joint Boundary Commission composed of representatives of both States has been rejected by the Governor of Ohio pursuant to his letter dated January 14, 1966, addressed to Attorney General Frank J. Kelley of the State of Michigan reading as follows:

"It is fortunate indeed that the question with respect to the Ohio-Michigan boundary does not apparently demand solution as the legislative bodies of our two states are not synchronized. Apparently the Michigan Legislature is in session or has recently been in session. The Ohio General Assembly adjourned over the recess months ago and will not again be in session until January, 1967. When it reconvenes in 1967, even if it is then willing to set up a qualified boundary body from the present one as its members will be elected under a new 'one man-one vote' apportionment.

"It would seem to me that prompt action could be taken to define the boundary whenever it might be in question if Michigan would simply petition the United States Supreme Court for a declaratory judgment on the matter. I understand that the Supreme Court has original jurisdiction in any dispute between states and if it took jurisdiction of the case would be able to name a Special Master to hear evidence."; and

WHEREAS, The determination and establishment of this boundary is essential with respect to the enforcement of the laws of each state and to the determination of the ownership of the bottom lands of Lake Erie between these states; now therefore be it

RESOLVED BY THE HOUSE OF REPRESENTATIVES (the Senate concurring), That the Attorney General of the State of Michigan be requested to take such legal action and to do and perform such legal proceedings as may be necessary in the Supreme Court of the United States or any other court of competent jurisdiction for the purpose of securing a final and judicial determination of the location of said boundary; and be it further

RESOLVED, That should the Attorney General have special or extraordinary expenses with regard to the prosecution of such proceedings that the Legislature would give favorable consideration to any special budgetary items needed to defray said expense; and be it further

RESOLVED, That all departments and agencies of the state government cooperate with the Attorney General and make available to him any information, data, documents and services which he may need in the prosecution of such proceedings; and be it further

RESOLVED, That a copy of this concurrent resolution be transmitted to the Attorney General of the State of Michigan, Frank J. Kelley.

Adopted by the House April 6, 1966.

Adopted by the Senate April 7, 1966.

Eugene B. Farnum
Secretary of the Senate.

F. Thore Thatcher
Clerk of the House of Representatives.

NOV 21 1966

No. 30, Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

BRIEF OF THE STATE OF MICHIGAN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

FRANK J. KELLEY
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Solicitor General

Nicholas V. Olds
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Attorneys for the Plaintiff
State of Michigan

The Capitol
Lansing, Michigan

PRINTED BY SPEAKER-HINES AND THOMAS, LANSING, MICHIGAN — 1966

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1966

No. ——, Original

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

BRIEF OF THE STATE OF MICHIGAN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

HISTORICAL BACKGROUND

This boundary dispute traces its beginnings to the stormy controversy that raged over Michigan's admission into the Union in 1836-1837.[1] The dispute became so acute and

[1] For a detailed account of this aspect of the territorial dispute between Michigan and Ohio, see:

Willis F. Dunbar — Michigan: A History of the Wolverine State (1965) Chap. 10.

George J. Miller — The Establishment of Michigan's Boundaries: A Study In Historical Geography, Bulletin of the American Geographical Society (1911) XLIII, pp. 339-351. *(See Page 2)*

feelings between the people of the Territory of Michigan (at that time voiceless and voteless in the halls of Congress) and the State of Ohio became so charged with emotion that at one time it seemed war might be waged between them. In fact, in the pages of history it has taken on the name of the "Toledo War." Although in retrospect historians depict the "Toledo War" as having its overtones of comic opera, nevertheless, in those days it was real serious business. An actual armed conflict was averted only by the intervention of the President of the United States and the Congress.

The states of Ohio and Michigan were carved out of the northwest territory which was brought into being by the Virginia cession on condition that it would be used for the formation of new states. The result was the adoption by the Congress of the Ordinance of 1787 providing that not less than three nor more than five states should be formed in this large expanse of land lying northwest of the river Ohio. In this ordinance Congress reserved the authority at its discretion to form "one or two states in that part of said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan." This imaginary "east and west" line has since been known as the Ordinance Line. At this early time knowledge of geography was imperfect, no actual land surveys had been made and it was believed that the

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Anna May Soule	The Southern and Western Boundaries of Michigan, Mich. Pioneer and Historical Collections, XXVII (1896), pp. 346-390.
Claude S. Larzelere	The Boundaries of Michigan, Mich. Pioneer and Historical Collections XXX (1903), pp. 1-26.
Carl Wittke	The Ohio-Michigan Boundary Dispute Reexamined, Ohio State Archaeological Historical Quarterly, Oct. 1936, pp. 1-21.

"southerly bend or extreme of Lake Michigan" lay considerably to the north of its true location. Based on this premise it was apparently assumed that the Ordinance Line when projected eastward from the southerly bend of Lake Michigan would strike the west shore of Lake Erie near or north of Maumee Bay.

In 1802[2] Congress authorized the people of Ohio to draft a constitution preparatory to applying for statehood. A doubt arose in the minds of the framers of the constitution of Ohio whether, in fixing the boundaries of the new state, the use of the Ordinance Line as a boundary description would assure to Ohio the mouth of the Maumee River and its outlet in Maumee Bay. Delegates to the Constitutional Convention of Ohio inserted in the boundary descriptions of their proposed constitution a proviso that if it should be found that the Ordinance Line would not intersect Lake Erie, or that it would intersect the Lake east of the mouth of the Maumee River, then with the "assent of Congress" the northern boundary of the state should be a direct line drawn from the southerly extreme of Lake Michigan to the northern cape of Maumee Bay.[3]

In January 1805 Congress in creating the Michigan territory specified the Ordinance Line as the territory's southern boundary.[4]

Further controversy was halted by the War of 1812. Early in that year Congress authorized the President to cause a survey to be made of the northern and western boundaries of Ohio.[5] But the work was not undertaken until 1816 when Edward Tiffin, Surveyor General of the

[2] Act of April 30, 1802, 2 Stat. 173
[3] Ohio Const. of 1802, Art. VII, Sec. 6.
[4] Act of Jan. 11, 1805, 2 Stat. 309
[5] Act of May 20, 1812, 2 Stat. 741

United States and formerly Governor of Ohio, was ordered to proceed. He commissioned his deputy, William Harris, to lay out the boundary line and commanded him to establish it in accordance with the provisions of the Ohio Constitution of 1802. The line so surveyed ran from the southern extreme of Lake Michigan to the northern cape of Maumee Bay and became known as the Harris Line. This survey put Toledo in Ohio. Governor Cass of Michigan protested the Harris survey and President Monroe ordered a new survey which was made by John A. Fulton in 1818. This survey established the Fulton Line, running below Toledo and putting that city in Michigan. The land between the Harris Line and the Fulton Line was a wedge-shaped tract, five miles wide at the Indiana border and eight miles wide at Lake Erie. It was soon known as the "Toledo Strip." Michigan was satisfied with the Fulton survey but Ohio was not.

In order to assist it in resolving the controversy the Congress by Act of July 14, 1832, 4 Stat. 596 directed the President of the United States to do the following:

> "That the President of the United States cause to be ascertained by accurate observation, the latitude and longitude of the southerly extreme of Lake Michigan; and that he cause to be ascertained, by like observation, the point on the Miami of the Lake which is due east therefrom, and also, the latitude and longitude of the most northerly cape of the Miami bay, also, that he cause to be ascertained, with all practicable accuracy, the latitude and longitude of the most southerly point in the northern boundary line of the United States in Lake Erie; and also, the points at which a direct line drawn from the southerly extreme of Lake Michigan to the most southerly point in said northern

boundary line of the United States, will intersect the Miami river and bay; and also, that he cause to be ascertained by like observation, the point in the Mississippi which is due west from the southerly extreme of Lake Michigan, and that the same observation be made, and the result thereof returned, to the proper department within the current year."

By Act of March 2, 1833, c. 54, sec. 5, 4 Stat. 628 the time for taking the observations was extended to December 31, 1835.

Captain Talcott of the Corps of Engineers was the officer charged with executing this Act. A copy of his report was transmitted to the 24th Congress (Doc. 7, page 2, Executive Doc., 24th Cong. 1st Sess.). His drawings illustrating the position taken for determining the latitude and longitude of the different points specified by law, together with a general map showing the relative positions of each of the several lines and points specified in the law were sent by the President to the Congress (Doc. 54, Executive Documents, 24th Cong. 1st Sess. vol. 2). We have appended to the complaint a reproduction of the general map prepared pursuant to this Act.

In none of these surveys or observations nor on any map or drawing prepared and submitted either to the President or to the Congress, can there be found any line drawn from the north cape of Maumee Bay across Lake Erie to the boundary between the United States and Canada.

With the death of Territorial Governor Porter in 1834, Stevens T. Mason became Acting Territorial Governor and initiated a campaign to change the Territory of Michigan to a state. Mason insisted that Michigan now met the

population requirements of the Ordinance of 1787 and was entitled as a matter of right to enter the Union, subject only to the adoption of a state constitution and the establishment of state government. Mason called attention to the Ordinance Line fixed in the Ordinance of 1787 as giving Michigan a clear title to the Toledo Strip. He called a constitutional convention to meet in May of 1835. Governor Lucas of Ohio was not unaware of Mason's activities. In April of 1835, in a determined effort to re-mark the Harris Line and to subject the Toledo Strip to Ohio law, he ordered out the militia to protect his surveyors. As a part of the scheme, Ohio courts were surreptitiously convened in the Toledo Strip. Governor Mason countered by ordering General Brown to Monroe to assemble the militia and there Mason joined him on April 1, 1835 to direct operations. Serious conflict was averted by President Jackson's removal of Mason as territorial governor and the disbanding of the militia.

In 1835 the people of the Territory of Michigan assembled in constitutional convention in the City of Detroit and on the second Monday of May of that year adopted the Constitution of Michigan of 1835. In its constitution it embraced the Ordinance Line of 1787 and thus injected this explosive issue into the debates of Congress by presenting this constitution to the Congress for approval. But this effort was unsuccessful and Congress, in an Act of June 15, 1836, established the boundaries for the State of Michigan and conditioned her admission into the Union upon the acceptance of the boundaries so established.

During the course of the controversy ex-President John Quincy Adams, favoring the cause of the Territory of Michigan, is reported to have said:

"Never in the course of my life have I known a controversy of which all of the right was so clear on one side and all the power so overwhelmingly on the other, never a case where the temptation was so intense to take the strongest side at the duty of taking the weakest was so thankless."[6]

The Michigan legislature called a convention for assenting to the conditions for admission to meet at Ann Arbor on September 26, 1836. When convened it promptly rejected the proffered boundaries by a decisive vote and adjourned. Political leaders rallied a second convention which met at Ann Arbor on December 14, 1836 and gave its "assent" on December 15 to the Act of Congress. President Jackson reported this fact to Congress on December 27, 1836 and a bill was passed which admitted Michigan into the Union on January 26, 1837.

THE BOUNDARY INVOLVED

The act enabling Michigan to be admitted into the Union (the Act of June 15, 1836, c. 99, 5 Stat. 49) describes the common boundary between the states of Michigan and Ohio as follows:

"A direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; *and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake*

[6] George J. Miller, The Establishment of Michigan's Boundaries, supra.

Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania." (Emphasis supplied)

The Act of June 23, 1836, c. 117, 5 Stat. 56 (an act to settle and establish the northern boundary line of the State of Ohio) describes the northern boundary of Ohio to be:

> "A direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; *thence, northeast,* to the northern boundary line of the United States; thence, with said line, to the Pennsylvania line."

The judiciary committee of the House reporting on a bill which finally became the Michigan Enabling Act of June 15, 1836 apparently understood that the line from the north cape of Maumee bay would be extended direct to the international boundary line from the southern extreme of Lake Michigan through the north cape of Maumee, since the committee in its report to the House stated:

> "That it is expedient to establish the northern boundary of Ohio, by a direct line drawn from the southern extreme of Lake Michigan, after intersecting the eastern boundary of Indiana, to the most northerly cape of the Maumee; *thence, direct to the territorial line in Lake Erie, and by the said territorial line to the Pennsylvania line."*[7]

Officials representing Ohio before the committees of Congress at that time claimed that the northern boundary of Ohio should be drawn on a course beginning at the southern extreme of Lake Michigan to the north cape of the Maumee

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[7] Rep. No. 380, Report of Committees 24th Cong. 1st Sess. p. 18.

bay, and thence through Lake Erie to the international boundary line. It is apparent from the report filed by the Judiciary Committee of the Senate that the north cape of the Maumee bay was the "most northern point contended for by Ohio." (Report 211, page 14, Sen. Doc. 24th Cong. 1st Sess.)

It can be seen from an examination of the general map of Talcott attached to the complaint that the line set by Congress in 1836 from the southern extreme of Lake Michigan to the north cape of Maumee bay runs in a northeasterly direction. There is nothing in the legislative history indicating that this line should run on a different bearing in its extension from the north cape to the international boundary line.

The boundary question remained in a state of quiescence from these early years until 1915-1917 when the land boundary between Michigan and Ohio was ascertained and monumented by a joint survey which ended at post 71 which is located 900 feet west of the shore of Lake Erie.[8] No question at that time arose with respect to the location of the boundary extending across Lake Erie to the international boundary line.

As is alleged in paragraph 5 of the complaint, reference is made to a base map of Ohio printed by the United States Department of the Interior, Geological Survey, in 1910-1911 showing the Lake Erie segment of the boundary as connecting the north cape with turning point 160 of the international boundary on a bearing of approximately

[8] "Biennial Report of the Director 1914-1916 and Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary," 1916 Pub. 22, Michigan Geol. Series 18, Mich. Geol. and Biol. Survey.

N 63° 45′ E; and that in 1922 Professor C. E. Sherman, an official of Ohio, apparently drew the line on the same bearing on topographical survey maps. Later, however, Professor Sherman asserted that this was an error and in Vol. IV of the Final Report of Ohio Cooperative Topographical Survey, 1933, on p. 43 he states that the line in Lake Erie between Ohio and Michigan is not settled. He said:

> "In conclusion it should be noted that the Lake portion of the Ohio-Michigan boundary is erroneously shown on the two maps in envelope on the rear cover of this book. The line as shown on these two maps connects North Cape with International boundary turning point 160, and has a bearing of approximately N 63° 45′ E. The law prescribes a line bearing *northeast* from North Cape. In nautical language this is a specific direction meaning N 45° E. Therefore the area of Ohio, if scaled only to such boundaries as are shown on the two maps just mentioned will be too small by the triangle included between the two foregoing lines and the international boundary. The error thus introduced would be about 70.6 square miles."

On June 8, 1933 the 90th General Assembly of Ohio[9] passed the following joint resolution relative to this segment of the boundary line:

> "WHEREAS, *Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie,* due to the omission of this portion of the boundary on some maps and its incorrect position on others, and
>
> "WHEREAS, The easterly terminal monument of the Ohio-Michigan land boundary line set in 1817 by

[9] 115 Ohio Laws 685, G C § 13855-1

Andrew Harris has disappeared, due to the washing away of North Cape at the place where the monument originally stood, and

"WHEREAS, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S. 45° W.) through the center of Turtle Island which is located at latitude 41° 45′ 08.8″ and longitude 83° 23′ 28.8″ according to primary triangulation of the United States lake survey published in 1882, and

"WHEREAS, The center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U. S. lighthouse service, which wall is still standing; therefore,

"*Be it resolved by the General Assembly of the State of Ohio,* that with the concurrence of the legislature of Michigan, the boundary line between the two states in Lake Erie shall be a line passing through the center of the aforesaid circular wall and bearing south forty-five degrees west (S. 45° W.) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle Island." (Emphasis supplied)

In 1945 a concurrent resolution relative to this segment of the boundary line identical with the 1933 Ohio resolution was adopted by the Senate and House of the State of Michigan.[10]

In 1947 a House Concurrent Resolution[11] of the Michigan legislature rescinded the 1945 resolution and requested the Governor of the State of Michigan to confer with the Governor of the State of Ohio with a view to requesting the legislatures of the two states "to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie," copy of which is set forth in the appendix hereto.

As alleged in our complaint no definitive action has been taken by either state to settle this disputed segment of the boundary. That there exists uncertainty as to its location even on the part of officials of Ohio is indicated by the language in the first recital contained in the Ohio resolution of June 8, 1933.

Resolutions of the legislature of Michigan under its Constitution of 1908 are not binding upon the state and do not have the effect of law. In *Boyer-Campbell Co. v. Fry*, 271 Mich. 282, page 296, the Michigan Supreme Court ruled:

> "Legislative resolutions are not law, although they are entitled to respectful consideration (*Becker v. Detroit Savings Bank*, 269 Mich. 432)."

The most that can be said for the resolutions passed by the legislatures of both states is that they express the un-

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[10] 1945 House Journal pp. 591, 807, 1945 Senate Journal pp. 291, 619

[11] 1947 House Journal pp. 957, 1170, 1947 Senate Journal pp. 971, 1125

certainty which exists as to the proper construction of the congressional acts of 1836 pertaining to the Lake Erie segment of the boundary.

Even if these two states had adopted identical acts with respect to the location of the Lake Erie segment of the boundary amounting to a compact, such compact would not have been valid unless and until approved by the Congress of the United States pursuant to Article I, Sec. 10, Clause 3 of the Federal Constitution providing:

> "No State shall, without the Consent of Congress, * * * *enter into any Agreement or Compact* with another State, * * *." (Emphasis supplied)

Boundaries between states can have serious political consequences and any settlement of their location should be submitted to the Congress for its scrutiny and approval. Otherwise, states could swap territory at will and bring about considerable realignment of the political structure not only of the states involved but also of the Congress itself and the federal government.

These implications of the compact consent clause in the federal constitution were set forth with eloquence by this court in the early case of the *State of Rhode Island v. State of Massachusetts*, 12 Pet. (37 US) 657. Unless the operative effects of this clause to boundary agreements or compacts between states were made applicable, the court stated at pages 725 and 726:

> "* * * it would render the clause a perfect nullity for all practical purposes; especially the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts. Not to prevent the states from settling their own boundaries, so far

as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other states of the Union and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure."

Following the decisions of this court in *Michigan v. Wisconsin*, 272 US 398, and *Wisconsin v. Michigan*, 297 US 547, involving a dispute regarding the location of certain segments of the boundary between these two states, the states of Michigan, Wisconsin and Minnesota entered into a compact which defined and established other segments of their boundaires in Lake Michigan and Lake Superior by the passage of identical acts. This compact received the approval of Congress June 30, 1948, PL 844, Chap. 757, 62 Stat. 1152.

The Location of the Northerly Cape of the Maumee Uncertain.

The most northerly cape of the Maumee (Miami) bay called for in the boundary description as it existed in 1836 has long since been eroded by the waters of Lake Erie. The geographical location and contour of this cape as it then existed involve matters of proof. The description does not specify the point on this cape to which the line from the southerly extreme of Lake Michigan is to be run. This is a question of congressional intent and requires legal construction and interpretation of this call in the description.

Power of the Court to Decide Boundary Cases.

That this court has jurisdiction under the judiciary clause of the United States Constitution to entertain suits

between states involving their boundaries was firmly established in *State of Rhode Island v. State of Massachusetts*, supra.

It is the position of the Attorney General of the State of Michigan that a genuine dispute exists between these states with respect to the true location of the Lake Erie segment of their boundary, a dispute which this court should decide. Efforts made by officials of these two states to settle this boundary dispute have failed. The terms of the congressional acts describing the northern boundary of the State of Ohio are couched in such general and vague language that their true meaning and intent are not ascertainable from the acts themselves. It is apparent from the history of this boundary, as we have sketched it, that the Lake Erie segment cannot be determined except upon a thorough investigation of all of the legislative history preceding and succeeding the adoption of the description of this boundary by the Congress.

Thus, recourse must be had to the constitutional powers of this court to hear and examine all the evidence and facts which may be presented by both states and under accepted legal principles construe the language which the Congress wrote into the various acts it enacted and render a definitive and binding decision which will put the question to rest for all time.

CONCLUSION

After a painstaking research and investigation, the State of Michigan genuinely believes that the real and true intent of Congress in 1836 was that the Lake Erie segment of the boundary between these two states should be a direct extension of Talcott's line to the international boundary.

Officials of the State of Ohio dispute this contention and now insist that this line should be deflected at 45° beginning at some point on the north cape of Maumee bay, the location of which cape and point are not presently known.

As is set forth in the complaint, the Attorney General of the State of Michigan requested the Governor of Ohio, the Honorable James A. Rhodes, to initiate steps toward forming a joint commission which would be empowered to make a settlement of this dispute. The Governor of Ohio responded by suggesting that the State of Michigan "petition the United States Supreme Court for a declaratory judgment on the matter."

The purpose of this brief is to show that a real and genuine dispute exists between these states and that the court should permit the State of Michigan to file its complaint so that the whole question be heard and decided with finality by this court.

Therefore, the Attorney General of the State of Michigan requests that the motion for leave to file this complaint be granted.

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Dated: ~~October 31, 1966~~
November 21, 1966

APPENDIX

A Concurrent Resolution Relative To The Boundary Line Between The States of Ohio and Michigan In Lake Erie Adopted During The 1947 Session Of The Michigan Legislature.

Whereas, In the 1945 regular session of the legislature of Michigan adopted Senate Concurrent Resolution No. 15 relative to the boundary line between the two states of Ohio and Michigan in Lake Erie; and

Whereas, Said concurrent resolution was presented to the legislature as a part of a proposal to determine the area of the entire state by inclusion of water areas within the total and without any other significance; and

Whereas, Upon subsequent investigation it became apparent that an area of about 70 square miles in Lake Erie was involved in the matter then presented and some question as to the jurisdiction over said water existed between the state of Ohio and the state of Michigan; and

Whereas, The particular area in question became a matter of dispute because of early surveys and maps purporting to determine the boundary line between the states in Lake Erie and showing for a great many years that the said boundary ran from a terminus in Lake Erie from a nonexistent boundary marker, which was formerly Grassy Point, to a turning point in the international boundary line between the United States and Canada, said line being at an angle more acute than 45 degrees; and

Whereas, The state of Ohio, by a concurrent resolution adopted several years ago attempted to resolve the stated

uncertainty concerning the boundary line by adopting a point on Turtle Island in Lake Erie as a basis for a line at 45° to intersect the land boundary line between the states and to intersect the international boundary line thereby conforming more closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states; and

Whereas, It is apparent that for many years the state of Michigan has exercised jurisdiction over the area in question and may have established by adverse possession and by consent and acquiescence of the state of Ohio a good title thereto; and

Whereas, Since the action of the two legislatures by concurrent resolution is not sufficient in the law governing the relationship of States to convey title or change boundary line, no settlement of any such dispute can be reached by such method; and

Whereas, If a settlement is to be reached it will, of necessity, require statutory enactment by the two states and should be the subject matter of an investigation by a joint boundary commission; now therefore be it

Resolved by the House of Representatives (the Senate concurring), That the State of Michigan nor any rights of said state concerning the boundary line in Lake Erie between the state of Ohio and the state of Michigan were not affected by the adoption of Senate Concurrent Resolution No. 15 of the 1945 session of the Michigan legislature; and be it further

Resolved, That insofar as said concurrent resolution No. 15 may in any manner be interpreted as determinative of the position of the state of Michigan with regard to the

said boundary in Lake Erie, said concurrent resolution is hereby rescinded; and be it further

Resolved, That the Governor of the state of Michigan is hereby requested to confer with the Governor of the state of Ohio concerning the subject matter hereof with a view to requesting the legislatures to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie; and be it further

Resolved, That a copy of this concurrent resolution be sent to the Governor of this state.

FILED
MAR 30 1957
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 20, Original.

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 30, Original.

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT

The State of Michigan has filed with this Court a "Motion For Leave To File Complaint" (hereinafter referred to as the "Motion For Leave"), a "Complaint" (hereinafter referred to as the "Complaint"), and a "Brief Of The State Of Michigan In Support Of Motion For Leave To File Complaint" (hereinafter referred to as the "Brief"), all of which pertain to an alleged controversy between Michigan and the State of Ohio concerning the location of the boundary between said states in Lake Erie. In this brief, it is the sole purpose of the State of Ohio to show the Court that there can realistically be no dispute or controversy concerning the location of the Lake Erie portion of the boundary between these two states, and hence that this Court should deny Michigan's Motion For Leave.

It is not Ohio's position that this Court lacks jurisdiction in a case brought by one state against another to ascertain and establish a boundary between them. However, when the facts presented to the Court in the initial documents filed in an original action exhibit no actual dispute or controversy or when such facts would have to be unreasonably interpreted to render the relief sought by the plaintiff, the Court should utilize its screening authority to deny the plaintiff's motion for leave to file its complaint. It is Ohio's position that the instant case falls within this category of objectionable suits.

To facilitate a thorough understanding of Ohio's position, it is first necessary to distill from the aforesaid items filed by Michigan what they seek to have this Court do.

Initially, it is clear that Michigan is not contesting or calling into question the land portion of the boundary between the two states. Complaint, pp. 2, 6-7. Consequently, the only area of their concern is the Lake Erie portion of the common boundary.

Regarding the lake portion of the boundary, Michigan appears to have two goals, as indicated by their Complaint at pages 4-5, and 12, to-wit: 1) a declaration from this Court establishing the Lake Erie portion of the boundary line between Ohio and Michigan as a straight easterly continuation of the land boundary from the last marker on the land boundary line (Post No. 71) to the international boundary line; 2) a declaration from this Court determining the location of the most northerly cape of the Maumee (Miami) bay to which the Congressional acts establishing the boundary between these two states referred.[1]

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[1] 5 Stat. 49 (1836); and 5 Stat. 56-57 (1836).

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The State of Ohio in this brief will affirmatively show to this Court that the aforesaid determinations sought by the State of Michigan are not in fact necessary as these matters can be, and have been determined with such certainty as to not be reasonably subject to either discussion or debate, and much less judicial inquiry.

ARGUMENT

It is now, and has been, Ohio's claim that the portion of its northern boundary in Lake Erie was clearly and unambiguously settled and established by Congress in the year 1836. See 5 Stat. 49; and 5 Stat. 56-57.

Ohio claims that at the most northerly cape of the Maumee (Miami) bay, the northern lake boundary line of Ohio departs from the direction of the land boundary line and begins the course N 45 degrees E which course is followed the distance from said cape to the international boundary line.

Ohio further claims that although the cape and the monument marking the most northerly cape of the Maumee (Miami) bay have been washed away and lost, that that point can be readily re-established and certainly ascertained by utilizing a point known to have intersected the line departing from said most northerly cape on the N 45 degrees E course and reversing that course by running a line on the course S 45 degrees W from said known point until it intersects the projection of the known and established land boundary line.

Ohio's claimed boundary and the point representing the most northerly cape of the Maumee (Miami) bay, determined as aforesaid, are graphically exhibited by the map which is appended to this brief.

A. At The Most Northerly Cape Of The Maumee (Miami) Bay, The Northerly Boundary Line Of The State Of Ohio In Lake Erie Departs From The Direction Of The Land Boundary Line And Begins The Course North 45 Degrees East, Which Course Is Followed The Distance From Said Cape To The International Boundary Line.

The Congressional acts establishing the northern boundary of the State of Ohio were passed in the year 1836, and are found in 5 Stat. 49, and 5 Stat. 56-57. It is Ohio's firm conviction and contention that these two acts can leave no doubt as to the position of its northern boundary in Lake Erie; consequently, both of said statutes will be examined with particularity.

On June 15, 1836, Congress passed an act entitled "An Act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed,"[2] which act appears in 5 Stat. 49, and provides in pertinent part:

> "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, *to the most northerly cape of the Maumee (Miami) bay*, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; *and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie;* and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania." (Emphasis added.)

[2] The conditions expressed in 5 Stat. 49 (1836), appear in section 2 thereof and provide that Michigan can gain statehood only upon express condition that she consent to and accept the boundaries set forth in the act, among which is that her southern boundary common with Ohio be the boundary line set forth in the first section of the act as Ohio's northern boundary. Michigan did consent to and accept these boundaries. See 5 Stat. 144 (1837).

The area of examination herein is the call in the description "and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie", with scrutiny of the words "from" and "northeast".

On June 23, 1836, eight days after the passage of 5 Stat. 49, *supra*, Congress passed an act entitled "An Act to settle and establish the northern boundary line of the State of Ohio," which act is found in 5 Stat. 56-57. The pertinent portion of this statute reads:

> "That the northern boundary of the State of Ohio shall be established by and extend to, a direct line running from the southern extremity of Lake Michigan *to the most northerly cape of the Miami bay; thence, northeast, to the northern boundary line of the United States;* thence, with said line, to the Pennsylvania line." (Emphasis added.)

The call in this act which pertains to the question at hand is "thence, northeast, to the northern boundary line of the United States", with special analysis of the words "thence" and "northeast".

Both of the aforesaid acts describe the same line, and in each of them Congress employed plain, clear and unambiguous languge to do so. The line described in both of these acts that forms the Lake Erie portion of Ohio's northern boundary, is a line departing from the land boundary line at the north cape of Maumee (Miami) bay on a course N 45 degrees E, which course is followed the distance from said cape to the international boundary line.

Consider initially the actual words utilized by Congress in each of these acts in light of the meaning of those words at the time they were used. In 5 Stat. 49 (1836), Congress first describes the land boundary line, which description terminates at the cape, and Congress then recites the next

call as "*from* the said north cape". The preposition "from" is described in the dictionary of the day as follows:

> "The sense of *from* may be expressed by the noun *distance*, or by the adjective *distant*, or by the participles, *departing*, removing to a *distance* . . ."
> Webster, American Dictionary of the English Language (1828).

Similarly, in 5 Stat. 56-57 (1836), Congress sets forth the land boundary call to the cape, and then the next call recited is "thence, northeast". The word "thence" was defined at the time of its usage as: "1. From that place." Webster, American Dictionary of the English Language (1828).

It is evident from the foregoing that the call following the one describing the land boundary line is a call departing from said land boundary line at its terminus, the cape.

Buttressing the conclusion of departure, and more importantly describing the course of the departing line, is the word "northeast", which appears in both of said statutes following the words of departure discussed above. Again turning first to the plain meaning of this word, "northeast" had but one defined meaning at the time 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), were passed, to wit: "The point between the north and east, at an equal distance from each." Webster, American Dictionary of the English Language (1828). Hence, the use of this word in defining the northern boundary of Ohio not only reaffirms the fact that the lake boundary line departs from the land boundary line at the cape, but gives the course of the lake boundary line, which given course is the point equal distance from north and east, or in other words, N 45 degrees E.

Early and continued judicial interpretation of boundary descriptions containing a course of a line going to a com-

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pass position, further substantiates the fact that the call "northeast" in the aforesaid statutes means N 45 degrees E.

There are a plethora of cases interpreting a description employing a call to one of the cardinal points of the compass (North, East, South, West), to mean a line running directly in that course, unless qualified or controlled by other words in the description. See, *e.g., Hagan v. Campbell,* 8 Porter's Rep. (Ala.) 9, 31 (1838); *Vermont Marble Co. v. Eastman,* 91 Vt. 425, 443, 101 Atl. 151, 158 (1917); *E. E. McCalla Co. v. Sleeper,* 105 Cal. App. 562, 569, 288 Pac. 146, 148 (Ct. App. 1930). Even when the cardinal point course is qualified by the suffix "ly" or "ward" (e.g. northerly, southward), the courts have consistently interpreted the course to be a line directly to the cardinal point (e.g. due north, due south), unless controlled by other calls. See, *e.g., Jackson v. Reeves,* 3 Cai. R. (N.Y.) 293, 299 (Sup. Ct. 1805); *Brandt v. Ogden,* 1 Johns. R. (N.Y.) 156, 158 (Sup. Ct. 1806); *Currier v. Nelson,* 96 Cal. 505, 508, 31 Pac. 531, 532 (1892).

Although an exhaustive search has revealed but a few cases defining the course of a line contained in a boundary description to a compass point other than a cardinal point, those few cases are in accord with the cardinal point cases (and each other) in holding that a line following such a call must run directly in that course, unless a different location is required by other words in the description. See, *Moore v. Harris,* 2 Ky. Dec. 18 (1801); *Irwin v. Towne,* 42 Cal. 326, 334 (1871); *Holden v. Alexander,* 82 S.C. 441, 454, 62 S.E. 1108, 1112 (1908). The most succinct statement of this proposition is contained in the case of *Holden v. Alexander, supra*:

> "While the course 'southwest' called for in the deed without stating degrees is unusual, and possibly might

> not have been intended to mean an exact course, yet *'southwest means a course equally diverging from south and west, or south 45 degrees west;'* and when used in a deed a different meaning cannot be given to it by parol testimony." (Emphasis added.)

Neither of the descriptions here in question contain any words or other calls which would qualify or change the course "northeast" to something other than due northeast, N 45 degrees E.

In each of the aforesaid statutes, Congress utilized plain, clear and unambiguous language in describing the northern boundary line of the State of Ohio in Lake Erie. In both of said statutes Congress described the line in question as a line departing from the direction of the land boundary line at the most northerly cape of the Maumee (Miami) bay and beginning at the cape the course N 45 degrees E, which course is followed the distance from said cape to the international boundary line. The course "northeast" and the distance from the cape to the international boundary line are the only description of the Lake Erie portion of Ohio's northern boundary line given in 5 Stat. 49 (1836) and 5 Stat. 56-57 (1836). As was stated by Chief Justice Marshall in *Chinoweth v. Haskell*, 28 U.S. (3 Pet.) 92, 96 (1830):

> "The *courses and distances* are less certain and less permanent guides to the land actually surveyed and granted than natural and fixed objects on the ground; but they *are guides to some extent, and, in the absence of all others, must govern us.*" (Emphasis added.)

B. The Most Northerly Cape Of The Maumee (Miami) Bay Can Be Readily Re-established And Certainly Ascertained By Taking A Point Known To Have Intersected The Line Departing From Said Cape On The Course N 45 Degrees E Therefrom, And Reversing That Course By Running A Line On The Course S 45 De-

grees W From Said Known Point Until The Reverse Line Intersects The Projection Of The Known And Established Land Boundary Line.

At the outset of this facet of the State of Ohio's argument, it is helpful to refer to known propositions concerning the most northerly cape of Maumee (Miami) bay. They are as follows:

1. The most northerly cape of the Maumee (Miami) bay referred to in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), was originally located and monumented in the year 1817 by a surveyor named Harris; however, this monument and said cape were washed away and lost.[3]
2. The states of Ohio and Michigan jointly resurveyed and marked the land boundary between them, which resurvey terminated at Post No. 71, rather than said cape, due to the fact that the original cape monument could not be found.[4]
3. Post No. 71, which marks the easterly extreme of the jointly resurveyed land boundary line, is basically located near the edge of the water in Maumee bay, and is, of course, readily located.[5]
4. From the preceding section of this brief, it is evident that at the most northerly cape of the Maumee (Miami) bay, as referred to in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), the northern boundary line of the State of Ohio in Lake Erie departs from the direction of the land boundary line and begins the course N 45 degrees E, which course is followed the distance from said cape to the international boundary line.

In addition to the foregoing propositions, it is known that while the most northerly cape of the Maumee (Miami) bay and the monument set thereon by Harris were still in ex-

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[3] 115 Ohio Laws 685 (1933); Sherman, Ohio Cooperative Topographic Survey, Vol. IV (1933), p. 41.

[4] See Sherman, "Report of Engineer", Ohio Cooperative Topographic Survey, Vol. I (1916).

[5] See, *e.g.*, Sherman, *supra*, Vol. I, pp. 54-55, and map No. 9.

istence, a line run from that monumented point on the course N 45 degrees E to the international boundary line ran through a small island in Lake Erie named Turtle Island, the location of which island is fixed and known.[6]

Although the fact that the line on the course N 45 degrees E from said cape point to the international boundary line passes through Turtle Island may be established by a review of old Lake Erie maps and charts,[7] in the interest of brevity Ohio will refer and defer to obviously long-considered and thorough legislative acts considering this proposition and utilize the fruits of the legislator's labors.

Senate Joint Resolution No. 25, adopted by the Ohio General Assembly in 1933, provides as follows:

> *"Be it resolved by the General Assembly of the State of Ohio:*
>
> "WHEREAS, Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie, due to the omission of this portion of the boundary on some maps and its incorrect position on others, and
>
> "WHEREAS, The easterly terminal monument of the Ohio-Michigan land-boundary line set in 1817 by Andrew Harris has disappeared, due to the the washing away of North Cape at the place where the monument originally stood, and
>
> "WHEREAS, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S 45° W) *through*

[6] Professional Paper No. 24, Report upon The Primary Triangulation of the United States Lake Survey (1882), p. 799.

[7] See, *e.g.*, "Maumee Bay surveyed under the direction of Capt. W. G. Williams, 1844", Map P 45, GSA—National Archives. Referring to it as such, this map shows the boundary line between Ohio and Michigan as beginning a course of N 45 degrees E at the point described on the map as "North Cape". The boundary line shown on the map following the course N 45 degrees E from "North Cape", bisects Turtle Island, and is shown as either passing through the lighthouse on this island, or very near to it. The map shows Turtle Island to have a total area of less than an acre.

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the center of Turtle island which is located at latitude 41° 45' 08.8" and longitude 83° 23' 28.8" according to primary triangulation of the United States lake survey published in 1882, and

"WHEREAS, The *center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U.S. lighthouse service, which wall is still standing*; therefore,

"*Be it resolved by the General Assembly of the State of Ohio,* That with the concurrence of the legislature of Michigan, the boundary line between the two states in Lake Erie shall be a *line passing through the center of the aforesaid circular wall* and bearing south forty-five degrees west (S 45° W) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle island."

115 Ohio Laws 685 (Emphasis added in part.)

After twelve years, the Legislature of the State of Michigan passed a resolution identical with the above-quoted act of the Ohio General Assembly. See 1945 House Journal (Mich.) 591, 807; and 1945 Senate Journal (Mich.) 291, 619.

In the year 1947, the Michigan Legislature supposedly rescinded the aforesaid resolution passed in 1945.[8] At this stage of the proceedings in the instant case, examination of the effect of this rescission will not be made. Suffice it to say that even in view of the 1947 Michigan resolution, it is obvious that both state legislatures considered that a line following the course N 45 degrees E from the most northerly cape of the Maumee (Miami) bay when that point was

[8] 1947 House Journal (Mich.) 957, 1170; and 1947 Senate Journal (Mich.) 971, 1128.

known, passed through Turtle Island. A thorough review of the 1947 Michigan rescission resolution does not indicate that Michigan took issue with this proposition, as is evident by the following language therefrom:

> "Whereas, The state of Ohio, by a concurrrent resolution adopted several years ago attempted to resolve the stated uncertainty concerning the boundary line by adopting a point on Turtle Island in Lake Erie as a basis for a line at 45° to intersect the land boundary line between the states and to intersect the international boundary line *thereby conforming more closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states*;" Brief, pp. 17-18 (Emphasis added.)

From the foregoing legislative pronouncements, it is apparent that in their attempt to re-establish the lake boundary line between them called for in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), the legislatures in both states discovered that when the point of the most northerly cape of the Maumee (Miami) bay was known and monumented, a line run from the known point on a course N 45 degrees E passed through Turtle Island at the point referred to in the previous quote from the joint resolution of the Ohio General Assembly. See 115 Ohio Laws, *supra.*

In summary, then, the following are the "knowns": 1) the last course of the land line at Post No. 71; 2) the course of the lake boundary line from the most northerly cape of the Maumee (Miami) bay to the international boundary line is N 45 degrees E; 3) the course last referred to passes through Turtle Island; 4) the exact location of Turtle Island; 5) the point at which the lake boundary line passed through Turtle Island. Placing these five known quantities in an equation, the unknown, the point of the most north-

erly cape of the Maumee (Miami) bay, can be indisputedly ascertained.

It is a well established surveying principle that a course may be reversed to establish an unknown point. This principle has also been recognized by this Court. See, *e.g., Ayers v. Watson*, 137 U.S. 584, 590 (1891); *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 432 (1892). Thus, by reversing the known call of N 45 degrees E to S 45 degrees W, and running a line on this latter "reversed" course from the known position of Turtle Island to the point of intersection of that line with a projection of the land boundary line from Post No. 71, the unknown, the most northerly cape of the Maumee (Miami) bay, is determined. The map appended to this brief graphically depicts the procedure outlined above.

CONCLUSION

It is the State of Ohio's strong contention that the boundary line betwen it and the State of Michigan in Lake Erie is so certain as to not require judicial inquiry. Ohio feels that in view of the foregoing analysis of that portion of her common boundary with Michigan which Michigan seeks to attack in this suit, it is apparent that there is no justiciable dispute or controversy. Therefore, the State of Ohio respectfully urges this Court to deny Michigan's Motion For Leave.

Although we firmly believe in the position that we have presented in this brief, we have a somewhat ambivalent attitude toward this lawsuit in the respect that if the State of Michigan will not accept what we feel is obvious, it would be advantageous to us to have the matter resolved by this Court.

In the event that this Court should grant Michigan's Motion For Leave, it is our feeling that this case can be

adequately and fairly presented as to both states by the filing of briefs with this Court rather than by the more lengthy and expensive procedure of appointing a special master as Michigan prays for in her complaint. We respectfully suggest that this procedure be followed.

Respectfully submitted,

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March, 1967.

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